

Respondent and the Workers Compensation (Fund) both argue that the ALJ should be affirmed in all respects.

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Having reviewed the whole evidentiary record filed herein, the undersigned Board Member makes the following findings of fact and conclusions of law:

This appeal arises out of a preliminary hearing, the second of two that have been held in this claim. The first preliminary hearing resulted in an Order which found claimant was an employee of respondent rather than an independent contractor.<sup>1</sup> No benefits were ordered paid as there was insufficient evidence within the record for the ALJ to make any finding with respect to the respondent's payroll.<sup>2</sup> Thus, the ALJ could not determine whether the Act applied. This preliminary hearing Order was not appealed. A second preliminary hearing was held on March 17, 2009. Following that hearing an Order was entered. It is this Order that forms the basis for the instant appeal.

At the March 17, 2009 preliminary hearing, there was evidence offered as to the facts and circumstances surrounding the amounts paid to claimant. This evidence was intended to support the proposition that respondent's payroll met or exceeded the \$20,000 threshold set forth in K.S.A. 44-505. Included among all the evidence was testimony as to how claimant came to do business with respondent and the facts and circumstances relating to claimant's purchase of workers compensation insurance.

Respondent contends that claimant was hired as an independent contractor, not as an employee, as evidenced by the parties' contract. Respondent loaned claimant \$12,000 for the purpose of purchasing a truck and some tools so that he could perform service work on respondent's wells. Claimant and John Kelley, one of respondent's owners, entered into an agreement whereby claimant would use \$4,000 of the loan to purchase workers compensation coverage. Mr. Kelley made it clear that claimant was to obtain a policy that covered himself.

Claimant purchased insurance, but declined to cover himself due to the added cost. When Mr. Kelley learned of this, he contacted claimant and the insurance agent. A new policy was written to cover claimant. At some point that policy was either cancelled or lapsed, several months before claimant's injury, leaving claimant without workers compensation coverage.

At the second preliminary hearing, the ALJ concluded that claimant's evidence satisfied the burden of showing that respondent's payroll exceeded \$20,000 during the period at issue, and thus, claimant was entitled to coverage under the Act. But, in

---

<sup>1</sup> ALJ Order (Dec. 10, 2008) at 1.

<sup>2</sup> K.S.A. 44-505.

response to an argument made by respondent's counsel, she went on to conclude as follows:

4. The evidence further indicates that respondent advanced "up front" money to claimant for the purpose of purchasing workers compensation insurance. However, claimant later cancelled his workers compensation insurance coverage after accepting money from respondent to pay the premiums.<sup>3</sup>

Accordingly, although the ALJ concluded claimant established that he was an employee at the time of his accident and respondent's payroll was sufficient to invoke the provisions of the Act, claimant was nevertheless estopped from claiming benefits. It is this aspect of the Order that is the focus of this appeal.<sup>4</sup>

The doctrine of equitable estoppel is applicable in workers compensation proceedings.<sup>5</sup> Equitable estoppel requires a consistency of conduct, and a litigant is estopped and precluded from maintaining an attitude with reference to a transaction wholly inconsistent with his or her previous acts and business connections with such transaction.<sup>6</sup> In *Marley*<sup>7</sup>, an over-the-road trucker driver was injured while in the course of his duties while under an agreement with respondent. That agreement declared that the individual was an independent contractor rather than employee. That same agreement made insurance available to claimant under a separate program. Following the injury, Marley made a claim under the separate insurance policy, represented himself as an independent contractor and collected benefits. Claimant then asserted a claim for workers compensation benefits under that respondent's policy. The Court of Appeals declared that a "claimant who has taken advantage of agreeing that he is an independent contractor and who has received insurance benefits by claiming to be an independent contractor is estopped from claiming that he was an employee in the pursuit of a workers compensation claim."<sup>8</sup>

---

<sup>3</sup> ALJ Order (Mar. 26, 2009) at 2.

<sup>4</sup> The ALJ's findings with respect to claimant's status as an "employee" or "independent contractor" or the payroll issue are not before the Board at this time.

<sup>5</sup> *Marley v. M. Bruenger & Co., Inc.*, 27 Kan. App. 2d 501, 6 P.3d 421, *rev. denied* 269 Kan. 933 (2000).

<sup>6</sup> *Id.*, Syl. 1.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*, Syl 2.

The *Marley* Court stated:

We do not believe that it should be permissible for a claimant in a workers compensation action to change his or her position to claim he or she was an employee of the respondent at the time of the injury where the claimant has previously taken advantage of his or her representation that he or she is an independent contractor and not an employee. The law does not permit such an inconsistency in positions, and the doctrine of equitable estoppel may be employed to enforce this concept.<sup>9</sup>

The ALJ concluded that estoppel was appropriate and this member of the Board agrees. Claimant and respondent negotiated a contract which declares that claimant is an independent contractor. Claimant and respondent further entered into an agreement whereby respondent would loan claimant monies to start his business. Initially the loan was to be \$8,000, but when claimant learned the workers compensation coverage to cover him would cost nearly \$4,000 he asked respondent for additional funding. Respondent agreed and a total of \$12,000 was loaned. Claimant then turned around and although he obtained some workers compensation coverage, he failed to cover himself. This oversight was discovered and corrected. But for whatever reason, most likely a lack of funds (in spite of respondent's monetary gesture) the policy was cancelled or allowed to lapse, leaving claimant uncovered. Respondent clearly relied on claimant's recitations and representations, both with respect to his understanding that he was an independent contractor and not an employee, and with respect to the acquisition of coverage. Like the ALJ, this member of the Board concludes claimant is estopped from claiming coverage under the Act. The ALJ's Order should be affirmed.

By statute, the above preliminary hearing findings and conclusions are neither final, nor binding as they may be modified upon full hearing of the claim.<sup>10</sup> Moreover, this review on a preliminary hearing Order may be determined by only one Board Member, as permitted by K.S.A. 2008 Supp. 44-551(i)(2)(A), as opposed to the entire Board in appeals of final orders.

**WHEREFORE**, it is the finding, decision and order of the undersigned Board Member that the Order of Administrative Law Judge Nelsonna Potts Barnes dated March 26, 2009, is affirmed.

---

<sup>9</sup> *Id.* at 505.

<sup>10</sup> K.S.A. 44-534a.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of June 2009.

---

JULIE A.N. SAMPLE  
BOARD MEMBER

c: Mitchell W. Rice, Attorney for Claimant  
Jim Lawing, Attorney for Respondent and its Insurance Carrier  
James R. Roth, Attorney for the Workers Compensation Fund  
Nelsonna Potts Barnes, Administrative Law Judge